IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-128

KRANCO, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

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SUBJECT INDEX

LIST OF AUTHORITIES

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Having reviewed the belated brief in opposition filed in this cause by Respondent National Labor Relations Board (the "Board"), Petitioner Kranco, Inc. ("Kranco") respectfully directs the Court's attention to the following points:

I.

INTRODUCTION

In its brief, the Board predictably cites this Court to the substantial evidence rule governing appellate court review of administrative determinations, and after summarizing for the Court only that evidence supporting its

findings and conclusions, argues that the case "raises only an evidentiary question which does not warrant review by this Court." (Res. Br. 8). Such argument clearly invites a misapplication of the substantial evidence rule. In *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456 (1971), this Court emphasized that the substantial evidence rule is not satisfied merely by a showing that there is record evidence which when viewed in isolation substantiates the Board's findings. The record must be considered as a whole, taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Id.* at 488, 489. This Court further made clear that under the substantial evidence rule "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, *including the body of evidence opposed to the Board's view.*" *Id.* at 489 (emphasis supplied).

Denial of certiorari pursuant to the substantial evidence rule is particularly unwarranted when, as in the instant case, the petitioner argues and the record confirms that in reaching its result the Board committed fundamental errors of law which effectively foreclosed consideration of all evidence contrary to its view of the case. Thus, the substantial evidence rule cannot spare the Board from the consequences of its legal transgressions in this case.

II.

FAILURE TO REFUTE ECONOMIC JUSTIFICATION

To support the bare assertion in its brief that the evidence in this case overwhelmingly demonstrated that

the employees in question were discriminatorily discharged, the Board states *inter alia* that five days after the initial terminations, day-shift welder James Hindman acted as a witness when the in-plant committee informed petitioner's plant superintendent Raymond Vajak of the union's organizational campaign, and two days later, on March 12, Mr. Hindman was also terminated (Res. Br. 4-5). In so representing such issue to this Court, the Board disregarded, as it has throughout this case, Mr. Hindman's candid testimony, when called as a witness by the Board to explain the circumstances surrounding his termination. Beginning with his explanation of what was said when his supervisor, Mr. Chapman, told him that the company was letting him go, Mr. Hindman's testimony reads in material part as follows:

> Q: Did you say anything to Mr. Chapman?
>
> A: Well he said to me, you know, that he was sorry that this had to happen and that I was a good worker and everything and he hated to have to let me go. And I just told him you know that I understood the situation. (Tr. 276)
>
> * * *
>
> Q: Well, when you said you understood the situation, what did you mean?
>
> * * *
>
> A: That I knew that there was—I had heard earlier that day that there would be five people laid off and I figured I would be one of them because I hadn't worked there but a month and that's what I meant by it.
>
> Q: All right. You were, of course aware of the terminations on the night shift a week before?

A: Yes sir.

Q: Were you aware that there was not, did not appear to be a lot of work in the shop?

A: There wasn't very much going on in the shop.

Q: How long had that situation existed?

A: From—when I was terminated, before that?

Q: Yes.

A: Oh, say about two weeks before that I could see that it suddenly started slowing down.

Q: And you notice that yourself?

A: Yes sir. (Tr. 281-282)

Furthermore, the Board never presented any evidence and has never charged that any adversity befell any other members of the union in-plant committee who met with Mr. Vajak. And conversely, the Board never presented evidence and has never charged that other employees that the company did let go on March 12 and on subsequent dates during March and April were the victims of discrimination. All told during March and April there were roughly forty terminations in the production department at Kranco (Tr. 135). Approximately twenty were involuntary terminations about the same number were voluntary (Tr. 136), many of the latter having been caused by Kranco's elimination of overtime (Tr. 135 472). None of these employees were replaced, and the company's work force was thus reduced to between eighty and ninety (Tr. 138). Notwithstanding all of the foregoing, the Board determined that petitioner's economic justification was pretextual and therefore concluded that the March 4 terminations and Mr. Hindman's termination on March 12 were discriminatorily motivated.

How the Board could have reached a conclusion so divorced from economic realities is plainly explained in the Board's Brief in Opposition at page 6, wherein the Board sets forth the evidentiary basis upon which it determined petitioner's economic justification to be pretextual. That portion of the administrative law judge's decision quoted therein references basically a precipitous termination of union adherents amid evidence of employer animus toward the union organizational drive, and thus defines a classic *prima facie* case supporting an inference of discriminatory discharge.[1] *E.g., Cain's Coffee Co. v. NLRB*, 404 F.2d 1172, 1175-1176 (10th Cir. 1968); *NLRB v. Freemont Mfg. Co.*, 95 LRRM 3095, 3096 (8th Cir. 1977). In relying on such evidence not only to support a *prima facie* case, but also to discredit the petitioner's economic justification, the Board clearly has given conclusive weight to a mere *prima facie* showing in direct contravention of this Court's teachings in *Furnco Construction Corp. v. Waters*, 46 LW 4966 (1978).[2]

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1. Although the Board states that the terminations were effected "almost immediately" upon the inception of union activity and [petitioner's] acquisition of knowledge thereof, indeed there is a two-week separation between the two. Demonstrating further remarkable liberties with the facts, the Board concluded that Kranco's terminations centered upon known union adherents. In truth and in fact, however, there is no direct evidence in the record that the company knew at the time of their terminations that employees Mason, Armstrong, Starnes, Hundl and Carriere supported the union, and proof that the company knew that Gilmer supported the union is tenuous. Moreover, it was particularly within the province of the union to disclose that its organizational efforts and support were concentrated among the night shift employees in the structural department. However, neither the general counsel nor the union offered such evidence. Accordingly, the Board's finding that the company knew that union activity was strong, if not centered, among the night shift employees in the structural department is sheer speculation. (ALJD p. 10, l. 12-24).

2. The Board also references other extraneous bits of circumstantial evidence, none of which, if accurately recounted, is particu-

The Board's brief also demonstrates with equal clarity its determination not to abide by the "but for" test. The record is clear that the company effected its March 4 terminations on the night shift strictly on the basis of seniority in order to facilitate the company's overall goal to eliminate its night shift, which is a traditional economic measure during periods of declining business. Terminations based on seniority and designed to eliminate second shift operations are generally considered the most objective and indisputable means through which to effect a reduction in force. Thus, under the "but for" test, where an economically necessitated layoff is effected on the basis of seniority, the fact that a company "welcomes" the opportunity to discharge union adherents does not make the layoff discriminatory or unlawful. *NLRB v. Beech Aircraft Corp.*, 483 F.2d 51, 55 (10th Cir. 1973). Scrupulously avoiding the foregoing, the Board's brief repeatedly focuses on the Machulka head nod. However, in doing so, the Board merely highlights the fact that the

larly relevant. Thus, although the Board notes that petitioner's exhibits showed that the backlog for March, 1976 orders was higher than the previous "record year" (Res. Br. 6), as petitioner has repeatedly explained, that "backlog" had been almost completely exhausted by the time of the terminations and the company was rapidly reaching the "bottom of the barrel." (Pet. Br. 8). The Board also argues that the company advertised for new workers after the March discharges. (Res. Br. 6.) But see Pet. Br. 6, n. 2. The Board also incorrectly refers to the layoffs as "discharges," whereas the record is clear that they were called "terminations for lack of work." (Res. Br. 4). Moreover, management had no expectation of being able to re-employ any of the affected employees within the foreseeable future (Pet. Br. 7-8). Finally, in suggesting that the company deliberately withheld the work which could have been transferred from a newly acquired plant in Ohio (Res. Br. 8), the Board seriously misstates the record and asks this Court to accept the insupportable proposition that the company would seriously disrupt its production and submit a substantially revised budget to its parent company simply to rid itself of some union activists.

only record evidence even remotely relating to its rebuttal burden was equivocal in nature, was not in the opinion of the judge who heard the case entitled to "great weight" and in any event, was not dispositive of the issue.

CONCLUSION

This case stands as a landmark to the evils which result when the Board fails to adhere to applicable burdens of proof and ultimately fails to adduce evidence meeting the "but for" test. For in spite of petitioner's explanation that it suffered a fifty per cent reduction in the amount of available work for production employees, the Board simply ran roughshod over petitioner's economic justification, substituted its judgment for that of management, and peremptorily concluded that since the company had "met slow periods before without layoffs," it was obliged to do so again in the instant case. (Res. Br. 7). In light of the Board's failure to contradict in any meaningful way petitioner's documented explanation that the March 1976 business reversals were of an unprecedented magnitude, the Board, as a governmental agency, was simply not entitled to contradict management's decision to effect a reduction in force.[3]

3. Similarly ill-founded is the Board's criticism of Kranco management's handling of overtime during the period in question. It should be pointed out that company witnesses uniformly testified that they were hesitant to eliminate overtime for fear of losing experienced employees, and it certainly stands to reason that employees in general are not likely to welcome substantial reductions in their pay. Moreover, it is a fact that the company lost twenty employees through voluntary terminations during the period in question, in part because of elimination of overtime. Furthermore, elimination of overtime would have reduced production across the board, whereas the company in its terminations was seeking to reduce its work force in the fabrication department in which work shortage was most acute. Finally, shortly after the terminations in question, the company did in fact eliminate all overtime. In view of these

The Board cannot dispute the confusion which has overtaken this area of the law and which is proceeding at an ever accelerating pace. This case draws in stark relief the issues which must be resolved if clarity is to be restored; and, accordingly, petitioner renews its prayer that *certiorari* be granted.

Respectfully submitted,

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circumstances and the short period of time involved, the sequence in which the company took such measures is of virtually no significance in determining the company's motives for the terminations.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief of Petitioner for Writ of Certiorari have been served upon Mr. Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570, and Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing same to them postage prepaid, at their respective addresses this _____ day of November, 1978.

CLINTON S. MORSE